IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA,
Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER, MAURO JOHN MONTANA

ANNA R. LAVIN
209 South La Salle Street
Chicago 4, Illinois
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

AUTHORITIES CITED.

CASES.

STATUTES.

MISCELLANEOUS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 198

MAURO JOHN MONTANA,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONER, MAURO JOHN MONTANA.

OPINION OF THE COURT BELOW.

The opinion in the Court of Appeals (R. 50-56) is reported at 278 F. 2d 68.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on April 29, 1960. (R. 56). On May 26, 1960, it was ordered by the said Court of Appeals that the petition for rehearing be denied (R. 57). The petition for a writ of certiorari was filed on June 29, 1960, within ninety days of the denial of the said petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED.

The pertinent text of the following statutory provisions is set forth in the appendix hereto, *infra*, pp. 1a-4a.

Act of April 14, 1802, 2 Stat. 155, Section 4.
Section 2172 of the Revised Statutes of 1874.
Section 1993 of the Revised Statutes of 1874.
Act of March 2, 1907, 34 Stat. 1228, 1229, Sections 3 and 5.
Act of May 24, 1934, 48 Stat. 797, Sections 1 and 2.

QUESTIONS PRESENTED FOR REVIEW.

1. Is the petitioner, who was born in Italy in 1906 to a United States citizen mother and a United States resident alien father, a citizen of the United States by operation of Section 2172 of the Revised Statutes of 1874?

a. In that Statute, does the term "persons who now are, or have been, citizens of the United States" apply distributively to either parent?

b. Is Section 2172 of the Revised Statutes of 1874 an exception to the presumption that a statute is meant to have prospective application?

2. May Section 1993 of the Revised Statutes of 1874, reenacted simultaneously with Section 2172 and pertaining to the same general subject, be enforced to the total exclusion and nullification of the Section 2172?

a. Do not the principles of statutory construction require that the statutes be reconciled, and mutually enforced, if they are not inherently inconsistent?

3. Did the petitioner become a citizen upon the resumption of residence in the United States by his citizen mother under the declaratory provisions of the Act of March 2,

1907; or, as a result of such resumption of residence and his own continued residence in the United States by operation of Section 2 of the Act of May 24, 1934?

a. Can the law of citizenship be so interpreted that a naturalized mother or expatriated mother, who resumed citizenship, pass greater rights to their respective foreign born child, than does a citizen mother who never lost her citizenship?

4. Should not a court of the United States exercise its equitable powers to rectify the frustration by a consular official of the desire and attempt of petitioner's mother to return to the United States before the birth of petitioner, and translate that desire and attempt into fact?

STATEMENT OF THE CASE.

The following statement incorporates the facts, almost verbatim, as narrated by the United States Court of Appeals for the Seventh Circuit in its opinion of April 29, 1960:

This declaratory judgment action was brought under the provisions of Section 360 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1503). The petitioner initiated the suit to determine his citizenship, a controversy having been precipitated by an administrative order directing his deportation. William P. Rogers, Attorney General of the United States, is the respondent as the head of the administrative agency issuing the order. (R. 41-44)

Petitioner was born in Italy on June 26, 1906. His mother, Maddelena Montana, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on

August 26, 1905, to Guiseppe (Joe) Montana, father of petitioner. (R. 20) Guiseppe Montana was born in Italy. Prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States. (R. 21)

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. (R. 21-22) The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. (R. 23) At the time she departed from the United States, Maddelena Montana was about four months pregnant.

About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. (R. 22) According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition * * *. You come back after you get your baby.'" (R. 23) After this visit to the American Consulate, Maddelena went to Acerra, Italy where she resided with her mother and where the petitioner was born on June 26, 1906. (R. 24)

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking." (R. 25)

After the birth of petitioner, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'" (R. 25)

Maddelena, with petitioner and his grandmother, then returned to the United States. The records of the Immigration Service procured at the trial reveal that petitioner (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother. (Pl. Ex. 1; R. 28, 37)

After arrival in this country, petitioner lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. (R. 26) After his marriage, and continuing to date, petitioner has resided with his own family in the Chicago, Illinois, area. (R. 29-30)

On January 7, 1958, petitioner was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. (R. 8, 17) On September 3, 1958, petitioner commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain respondent from taking any action on the basis of such proceedings. (R. 41)

The district court, after a trial on the merits, entered judgment in favor of respondent and dismissed the complaint. (R. 38-40) Appeal was taken to the United States Court of Appeals for the Seventh Circuit. (R. 40)

On April 29, 1960, the said Court of Appeals affirmed the judgment of the District Court, holding that Section 1993 of the Act of 1874 applies exclusively to the instant facts; that since petitioner's father was not a citizen of the United States, no rights of citizenship descended to petitioner at birth; that since petitioner's mother never lost her citizenship, there could be no later resumption of citizenship by which petitioner could claim a derivative naturalization; that no rights of citizenship could accrue to a child under the Fourteenth Amendment by the fact of conception in the United States. (R. 50-56)

Petition for rehearing was denied on May 26, 1960 (R. 57). This Court granted certiorari on October 17, 1960. (R. 57)

ARGUMENT.

I.

PETITIONER, WHO WAS BORN IN ITALY IN 1906, THE SON OF A NATIVE BORN UNITED STATES CITIZEN MOTHER AND A UNITED STATES RESIDENT ALIEN FATHER, IS A CITIZEN OF THE UNITED STATES BY OPERATION OF SECTION 2172 OF THE REVISED STATUTES OF THE UNITED STATES.

Petitioner contends he was a citizen of the United States, when he was born in 1906 of a United States citizen and resident mother and an United States resident alien father. His contention is based on the requirement that effect must be given to the plain words of the second clause of Section 2172 of the Act of 1874:

> "... the children of persons who now are, or have been, citizens of the United States, shall though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; ..." (Appendix p. 2a).

Section 2172 of the Act of 1874 is a substantial reenactment of the Act of April 14, 1802, excepting that the following proviso was omitted at the time of reenactment.

> "Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: ..." (Appendix p. 1a).

A literal reading of the section clearly gives petitioner citizenship by derivation from the citizenship of his mother, if (1) the Act was effective at the time of his birth in Italy in 1906 and if (2) the term "persons who now are, or

have been, citizens of the United States" applies distributively to either parent, and does not require that both parents be citizens.

It is our submission that the wording of Section 2172 of the Act of 1874 which provides "the children of persons" means "the child of any person" and is the plural used in the generic sense. The plural to encompass the distributive is common and usual in statutory drafting, and is ordinarily so understood.

But we need not rely exclusively on common and ordinary understanding. Section 1 of the Revised Statutes of 1874 expressly provides that "In determining the meaning of the revised statutes . . . words importing the plural number may include the singular."

On several occasions the meaning of the first clause of Section 2172 has come before the courts for determination and it has been uniformly held that the child of a naturalized mother and alien father falls within the description "the children of persons". The same rule must apply to the identical expression "the children of persons" used later in the same sentence with reference, not to the children of naturalized citizens, but to the children born abroad of American citizens. The child born abroad of an American mother and an alien father is clearly comprehended within the second clause of Section 2172. It is inconceivable that Congress could have used an identical expression [i.e., "the children of persons"] twice in the same sentence and intended thereby to attach to that expression two different meanings. It is clear that this expression "the children of persons" as used in the second clause of Section 2172 of the Revised Statutes means any child of any person who is an American citizen, without reference to whether that person be an American mother or an

American father and without reference to the alienage of the other parent. The following cases are all square holdings to the effect that the word "persons" as used in the first clause of Section 2172 of the Revised Statutes means either father or mother, and that a mother is enabled to pass citizenship to her children through her naturalization in the United States even though the father is an alien: *United States* v. *Kellar*, 13 F. 82 (D. Ill. 1882, opinion by Justice Harlan later of the Supreme Court of the United States); *United States* v. *Rodgers*, 144 F. 711 (E. D. Pa., 1906); *In re Graf*, 277 F. 969 (D. Md. 1922); *In re Bishop*, 26 F. (2d) 148 (W. D. Wash., N.D. 1927); *Matter of Owen*, 36 Ops. Atty. Gen'l (U.S.) 197 (1929).

In the United States it was early recognized that in some circumstances citizenship descended through the mother as well as through the father. Thus, in *United States* v. *Sanders*, 27 Fed. Cas. No. 16,220 (D. Ark.), an indictment for murder was dismissed because it appeared that the prisoner was an Indian and henee not within the jurisdiction of the court. The facts of that case were that he was the child of an Indian mother and a white father and the court adjudged he was therefore an Indian:

> "That act does not define an Indian, but uses a general term without embracing or excluding any particular class of persons. On consultation with my brother judge we concur in laying down this rule as the safest: that the child must follow the condition of the mother. If the mother is an Indian woman her offspring must be considered Indians within the meaning of the proviso alluded to, whether the father be a white man or Indian. And so, on the other hand, the child of a white woman by an Indian father, would, for all the purposes of that act, be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining

the condition of the offspring. This is substantially following the common law rule, which was borrowed from the civil law. Just. Inst. bk. 1, tit. 4, p. 13. The rule of the civil law was, that one born of a free mother was free, although the father was a slave; and so on the other hand, if the mother was a slave the offspring partook of her condition. Ruth. Inst. 247; *Shelton* v. *Barbour*, 2 Wash. (Va.) 67. There can be no doubt that the rule *partus sequitur ventrem* generally obtains in this country."

See also: *Roa* v. *Collector of Customs*, 23 Phil. Rep. 315, (1912):

"The words of Section 2172 are perfectly clear and unambiguous and it follows that their meaning must govern the courts whose "duty is simply to enforce the law as it is written" (*Chung Fook* v. *White*, 264 U.S. 443, 446). In any view of the matter, Mrs. Montana is a "person" comprehended within Section 2172 and plaintiff has gained citizenship through her American citizenship. Petitioner here satisfies the statutory qualifications for citizenship as set forth in Section 2172.

The principal resistance met in petitioner's effort to be declared a citizen under Section 2172 has not been directed to his failing to meet the statutory qualification. It has been an urging that Section 2172 be given retrospective operation.

The contention for retrospective application of the statute is made in the face of the very strong legal presumption that a statute is not meant to act retrospectively, and that it ought never to receive such a construction unless it is susceptible of no other. The presumption is that a statute will never be so construed unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legisla-

ture cannot be otherwise satisfied. *United States Fidelity and Guaranty Company* v. *United States for Use and Benefit of Struthers Wells Co.* 209 U.S. 306, 314.

Certainly there is nothing in the legislative history that compels rebuttal of the presumption. The Act of 1802 was the repealer of the hated Alien and Sedition laws, the so-called Nationality Act of 1798, it was the Jeffersonian measure designed to replace the Alien and Sedition laws with a *liberal* nationality and naturalization law. Logic requires that we do not attribute to the Jeffersonians a replacement that spoke only as of April 14, 1802, with no provision for the future. We submit that the real or implied intention of Congress does not require retrospective operation. Even Mr. Binney, the earliest advocate of retrospective operation, admitted he was not able to imagine any plausible political reason for it. (*Weedin* v. *Chin Bow*, 274 U.S. 657, 663.)

The other alternative for support of retrospective operation that "now" is a word so strong, clear and imperative that it always and invariably means at the present time, that is, at the time of the enactment of the Act of 1802. It is our submission that the statute does not meet the test. There is ample authority for statutory construction of the word "now" relating to a time contemporaneous with satisfaction of the provisions of the Act in which the word occurs. See *Protest of Chicago, R.I. & P. Ry. Co.*, 137 Okla. 186; *State* v. *City of St. Lawrence*, 101 Kan. 225; *Thompson* v. *Board of Commissioners of Reno County*, 127 Kans. 863; *Worthen* v. *Burgess*, 273 Mass. 437; *Board* v. *Smith*, 22 Ky. 430; *City of St. Louis* v. *Dorr*, 144 Mo. 466; *Clark* v. *Lord*, 20 Kans. 390; *Tillamook City* v. *Tillamook County Court*, 56 Ore. 112. It is our submission, in accordance with such approved interpretation of the word, that "now" means

as of the time when any citizenship case arises—that is, the statute speaks as of the time when any person who is a United States citizen has a child born abroad.

The Court of Appeals for the Seventh Circuit, by its decision, gives strength to the construction for which we contend, wherein it provides "It is true that Section 2172 was not expressly limited to certain factual situations in period of time prior to 1802." (R. 54) Since it is not expressly limited, then the words of the statute are not so strong, clear and imperative as to overcome the strong presumption of prospective operation.

Logic and the principles of statutory construction appear to direct our adherence to the basic rule of prospective operation in the application of Section 2172.

However, in reliance on *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940, and *D'Alessio* v. *Lehman*, N.D. Ohio, 183 F. Supp. 345, the Court of Appeals for the Seventh Circuit has apparently adopted the theory of retrospective application of Section 2172 in the case at bar.

In the *D'Alessio* case, the foreign born child relied upon the application of the Act of 1802. The Court, however, finding plaintiff directly within the provisions of Section 1993 as the son of a citizen father, rejected the argument because the father had not resided in the United States prior to plaintiff's birth. It will be observed that this petitioner fully satisfies the paternal residence proviso in the Acts of 1802 and 1855, as reenacted in 1874, conditional to the grant of citizenship. The qualification is that "the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Guiseppe Montana, the father of the petitioner, had resided in the United States both prior and subsequent to petitioner's birth. (R. 21, 26, 29)

The *Mock Gum Ying* case, however, does clearly apply Section 2172 retrospectively on a set of facts similar to those at bar. The Ninth Circuit, in that case, as well as the Seventh Circuit in this case, bottomed their findings of retrospective application on apparent endorsements of such application in this Court's decision in *United States* v. *Wong Kim Ark,* 169 U.S. 649 and *Weedin* v. *Chin Bow,* 274 U.S. 657.

Wong Kim Ark, supra, presented a single question of whether a child born in the United States of alien, resident parents, became at the time of his birth a citizen of the United States. The decision was that, by virtue of the Fourteenth Amendment, he did. Thus was presented an issue and decision wholly distinct from the cause at bar. In *Weedin* v. *Chin Bow, supra,* the issue was presented as to whether citizenship descended to the grandchild of a native born citizen, when the father of the child had never been in the United States prior to the child's birth (the same question was the basis of decision in the *D'Alessio* case *supra.*). The decision was that such a child was not entitled to citizenship. Thus was there again presented an issue and decision wholly distinct from the case at bar. *Chin Bow,* in urging certain language in the *Wong Kim Ark* case in support of his position, was met with the retort that "It is very clear that the exact meaning upon the point here at issue was not before the court." (P. 671) We adopt the retort in respect of *Wong Kim Ark* and *Chin Bow* as they were advanced in the instant case.

The seed of the theory of retrospective application that saw fruition in *Mock Gum Ying* was founded in an article of Mr. Horace Binney in *The Alienignae of the United States.* 2 American Law Register 193 (1854), in consideration of the fore-running act of 1802. Mr. Binney's theory,

written more than 50 years after the enactment, rested upon a textual examination of the language of the act, is stated casually in an introductory paragraph and derives its sole plausibility from the use of the word "now" in the statute, *i.e.*," . . . the children of persons who *now* are . . . citizens of the United States . . ."

No reason of policy or authority has ever been suggested by Binney or anyone else which would have led the Congress of 1802 to make this Act apply only to those persons who were citizens prior to 1802. Inasmuch as Section 5 of the Act of 1802 repealed all prior naturalization and citizenship laws, it clearly must have been the intent of Congress to make this Act prospective and continuous, as well as retrospective in operation, because no reason suggests itself why the United States should be left without provisions as to naturalization or citizenship for any appreciable length of time. In fact, the next law dealing with citizenship and naturalization was not passed until 1855. It seems inconceivable as a matter of common sense and sound policy that Congress intended to leave the United States without any statutory regulation on this question of citizenship and naturalization for more than half a century. Furthermore, no reason has ever been suggested why such a deviation from the normal and usual policy of Congress in enacting citizenship and naturalization laws which are prospective and continuous as well as retrospective in operation should exist in this solitary instance.

This leads us into an inquiry as to the meaning of the language of the Act of 1802. Mr. Binney is the only person who has ever really considered this language adversely. He stated no convincing reason why the language of the fourth section of the Act of 1802 quoted above had to be construed as only applicable to persons born prior to 1802.

There seems to be no reason for any such holding unless the word "now" constitutes a clear, strong and imperative showing that it was the intent of Congress to limit the operation of the Act of 1802 to the cases of those persons who were or had been citizens prior to 1802 and that no provision was made for the children born abroad of American parents who became citizens after 1802. To support this contention it would be necessary to demonstrate that the word "now" always and invariably means at the present time—that is, at the time of the enactment of the Act of 1802. This is the only argument ever advanced by Mr. Binney or anyone else to justify killing the Act of 1802 by judicial fiat. But this is not the only meaning of the word, as we have demonstrated hereinabove.

Difficulty is evidenced by the decision of the Court of Appeals for the Seventh Circuit in trying to reconcile Mr. Binney's interpretation of retrospective application of the Act of 1802 with reenactment of substantially the same statute in 1874. Explanation is given in three alternatives.

Recognizing a lack of any express limitation on the operation of Section 2172 in the Act of 1874, the Seventh Circuit opined that "The lack of such limiting language may have been due to inadvertence." (R. 54) It is interesting that the government, too, urges inadvertence in enactment as the only justification for urging we do not enforce the statutory provisions of Section 2172 (See P. 45, their Answer to Petition). But this is contrary to the presumption that in construing a statute everything has been expressed which was intended. (*Ester* v. *Centennial Board of Finance*, 94 U.S. 500), and is in effect an amendment to this statute.

The second alternative advanced is that "It may have been enacted to apply to situations between 1802 and 1855." (R. 54) Thus, the Seventh Circuit impresses upon the Act of 1802, as reenacted, prospective application contrary to the rationale upon which this cause was found against your petitioner, in that it does give the Act of 1802 prospective application. It also leaves open the question of why Congress reenacted the statute in 1874, when, under this interpretation, its vitality had been sapped entirely twenty years earlier.

The third alternative is that "It may have been reenacted merely to save rights of citizenship which accrued prior to 1802." (R. 54) This concurs with the opinion in *Mock Gum Ying* v. *Cahill*, 9th Cir., 81 F. 2d 940, that "now" means April 14, 1802 (P. 943). But this alternative, as well as the second alternative is directly contradictory of the announced intention and object of the Act of 1874 to revise, simplify, arrange and consolidate all statutes of the United States *in force* as of June 22, 1874.

One other reason suggests itself for the abandonment of *Mock Gum Ying* v. *Cahill, supra,* in that case itself. The Ninth Circuit decision indicates that courts will not disturb administrative construction if it is uniform and has more or less continuous use, except for strong reasons (81 F. 2d at 942). Evidences of administrative construction of § 2172 are found in this case where, upon entry into the United States, petitioner was recognized as a citizen of the United States. In *Mock Gum Ying,* a brother and sister of the plaintiff born under the same circumstances were admitted into the United States as citizens. No "strong reasons" present themselves to abandon administrative construction demonstrated by these two reported cases. Strong reasons do exist for adopting that administrative construction.

That prospective application is the correct interpretation of the Act of 1802 is made clear by the proceedings of the Commissioners of Revision in enacting the Revised Statutes on June 22, 1874. We point out that the duty of the three Commissioners was "to revise, simplify, arrange and consolidate *all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings.*" Therefore, the inclusion of the Act of 1802 in the Revised Statutes with the changes and simplifications, *which were actually made in its structure,* as Section 2172, indicates that the Commissioners of Revision apparently had no doubt that the Act of 1802 was prospective and continuous in its operation. We submit that the intent of Congress was clear, both in 1802 and in 1874.

Further, all other portions of the Act of 1802 and Section 2172 of the Revised Statutes are prospective and continuous.

> "It was suggested that the act of 1802, from which as we have seen, section 2172 is taken, was intended to be temporary in its operation, and to apply only to cases arising previous to its passage. In support of that proposition reference was made by counsel to *Campbell* v. *Gordon,* 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802, in any degree justifies, any such interpretation of the statute." *United States* v. *Kellar,* 13 Fed. 82.

> "In our judgment the intention was that the act of 1802 should have a prospective operation" (citing authorities). *Boyd* v. *Nebraska,* 143 U.S. 135, 177.

> "The relevant section, 2172, which it is maintained confers the right of citizenship, is the culmination of a number of acts on the subject based by Congress from the earliest period of the Government. Their

history will be found in Vol. 3, Moore's International Law Digest, P. 467. * * *.

"The act has also been held to be prospective in its operation * * * *Boyd* v. *Nebraska*, 143 U.S. 135 * * *." *Zartarian* v. *Billings*, 204 U.S. 170, 173, 174.

We feel that a reading of the above decisions will convince the Court that these judges considered the whole of Section 2172 of the Revised Statutes and the whole of the Act of 1802 to be prospective and continuous in operation. To the same effect see also *State* v. *Andriano*, 92 Mo. 70, 4 S.W. 263 (1887), writ of error dismissed, 138 U.S. 496; *State* v. *Penney*, 10 Ark. 621 (1850); *O'Connor* v. *The State*, 9 Fla. 215 (1860).

We submit that the Act of 1802 from which Section 2172 was derived was intended to be and was prospective and continuous in its operation; that likewise Section 2172 of the Revised Statutes was speaking as of the time of plaintiff's birth to a citizen parent and he was therefore born a citizen of the United States.

II.

THE ACT OF 1855, REENACTED IN THE REVISED STATUTES OF 1874 AS SECTION 1993, WILL NOT BE INTERPRETED TO NULLIFY SECTION 2172, SIMULTANEOUSLY REENACTED.

Simultaneous with the reenactment of the aforedescribed statute in 1874, the Act of 1855 was also reaffirmed as Section 1993 of the Act of 1874:

> "All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Appendix, p. 2a)

It is the holding of the United States Court of Appeals for the Seventh Circuit "In any event, considering both sections of the Act of 1874, Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth." (R. 54) Thus the court chose to enforce one of two statutes enacted simultaneously and pertaining to the same subject to the total exclusion of the other, though there is no express nor implied suggestion by the legislature to overcome the rule of statutory construction that in such circumstances, the statutes must be treated as mutually operative. *Pen-Ken Gas and Oil Corporation* v. *Warfield Gas Company*, 6 Cir., 137 F. 2d 871, 881. As opposed to the finding of the Seventh Circuit, petitioner suggests the evaluation by Mr. Justice Harlan in *United States* v. *Kellar*, 13 F. 82, as more legally acceptable:

> "Since the several sections which have been quoted are in the same revision of the statutes, it is the duty of the court to give them, if possible, such construction as will make them all operative. Consistent with any fair or reasonable interpretation of the language employed by Congress, the court should reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, D. Ill., 13 F. 82, 83.

Sections 2172 and 1993 are not inherently inconsistent. Section 1993 is narrower in scope, declaring the citizenship of the foreign born child of the citizen parent; Section 2172, broader in scope, provides for the derivation of citizenship of the ~~foreign born~~ child of parents, either or both of whom is a United States citizen. Section 1993 may be regarded as applicable in the derivation of citizenship through the citizen parent, to the extent that it

requires the residence of the alien father in the United States at some time prior to the descent of citizenship to the child. See *United States ex rel. Guest* v. *Perkins*, D.C.D.C., 17 F. Supp. 177. It has been observed hereinbefore that this petitioner satisfies the prior residence requirement by the father.

There are other considerations and rules of statutory construction which militate against the decision entered by the Seventh Circuit in this cause. First, the courts are obliged to consider equity and good conscience in construing doubtful statues. *Dinkins et al.* v. *Cornish*, E.D. Ark., 41 F. 2d 766, 767. Certainly equity and good conscience rebel at this form of expatriation of a man who has spent the 54 years of his life, save the first few months, in this country, whose physiognomy, demeanor, comportment and language identify him as an American; whose United States citizen wife and four United States citizen children, as well as he, know no other country. Further, a statutory construction must not be adopted, the effect of which is to produce inequality and injustice. *Greer* v. *Kinnan*, 8 Cir., 64 F. 2d 605, 607. The interpretation of the Seventh Circuit gives to men as a class greater political rights than to women as a class.

We submit that law and reason support the position for which we contend. The urging of the Act of 1855 as controlling renders the reenactment nineteen years later of Section 2172 meaningless and the ordinary rules of statutory construction prohibit such consideration. The act of revision itself designates the enactment of 1874 and the concomitant repeal of all prior legislation. Act of June 22, 1874, Revised Statutes, 2nd Ed. 1878, Section 5595.

The government contends, nonetheless, for nullification of Section 2172, and exclusive application of Section 1993. To justify the nullification, the government makes the claim that Section 2172 was inadvertently reenacted. In contemplation of a different section on different subject matter—but the same revision—this Court has clearly rejected the argument of inadvertence:

> "The Revised Statutes of 1874 were adopted, it must be presumed, with the knowledge on the part of Congress of the constructions previously placed by the Patent Office upon the twenty-fifth section of the Act of 1870. This presumption is strengthened by an examination of the Act approved February 18th, 1875, entitled 'An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States.' 18 Stat. at L. 316, Chap. 80. That Act, upon its face, shows that the entire revision of 1874, after it took effect, was carefully examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. . . The Act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further—as an examination of the statutes will show—since the Revised Statutes went into operation nearly eight hundred sections, other than those referred to in the Act of 1875, have been amended or repealed. . ." *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 45.

The argument of inadvertence finds its greatest refutation in the Revised Statutes themselves. The portions of Section 1993, which are derived from the Act of 1802, have been specifically eliminated from Section 2172:

> ". . . *provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." (Appendix p. 1a)

The careful excising of portions of the Statute reenacted elsewhere disproves inadvertence in the inclusion of Section 2172 in the revision.

Further disproof is found in the inclusion of Section 2172 and Section 1993 in the second edition of the Revised Statutes in 1878.

The precise purpose of Congress in reenacting the two sections relating to the same subject matter has never to our knowledge been clearly defined. Perhaps some explanation is available from their respective placements in the revision. Section 2172 is included under Title XXX of the Revised Statutes entitled "naturalization." Section 1993 is included under Title XXV entitled "citizenship." Conceivably, Congress intended that persons such as petitioner be regarded as comparable to those whose citizenship was derived from the naturalization of a parent, rather than as the declared citizens defined in Section 1993.

Whatever the reason, Congress did, in enacting Section 2172, provide that petitioner was a citizen through his mother. That provision may not be summarily overridden by guess and speculation, contrary to the express mandate of the provision, and contrary to the "duty . . . simply to enforce the law as it was written, when constitutionally possible." *Chung Fook* v. *White*, 264 U.S. 443, 446.

III.

PETITIONER BECAME A CITIZEN UPON THE RESUMPTION OF RESIDENCE IN THE UNITED STATES BY HIS MOTHER UNDER THE PROVISIONS OF THE ACT OF MARCH 2, 1907; OR, AS A RESULT OF SUCH RESUMPTION OF RESIDENCE AND HIS OWN CONTINUED RESIDENCE IN THE UNITED STATES BY OPERATION OF SECTION 2 OF THE ACT OF MAY 24, 1934.

In 1907, provision was made for the naturalization of foreign born children of naturalized parents, and of parents

who resumed citizenship. Such provision has been found declaratory of the common law. *Petition of Drysdale*, D.C. Mich., 20 F. 2d 957, 958. "Resumed" can only apply to expatriated mothers, "Naturalized" has been judicially determined to refer to either parent. No provision was made for naturalization of a foreign born child of a citizen mother. The necessary inference is that such a child required no provision, that he was a natural born citizen under Section 2172, *supra*. Otherwise a naturalized or an expatriated mother who resumed citizenship was, by law, endowed with greater political right and with power to pass greater rights than a native born mother who never lost her citizenship.

It is incongruous that citizen mothers who derived their citizenship by express mandate of the Constitution, without implementing statute, should be in a position less favorable than those governed by the fluctuating dispositions of Congress.

It is urged as an alternative that, during Mrs. Montana's visit to Italy, it be considered that her citizenship was in abeyance pending her return to the United States, and that, thus, upon her resumption of residence, petitioner became a citizen under the provisions of Section 2 of the Act of March 2, 1907:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the . . . resumption of American citizenship by the *parent*: Provided, that such . . . resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." (Appendix, p. 4a)

As a second alternative, it was submitted that petitioner became a citizen by the clear operation of the Act of May 24, 1934 five years after his entry into the United States in 1906. The application of this statute passed twenty-eight years after his birth finds justification in the comments of the Senate reporting committee:

> "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer citizenship upon her minor children born abroad who are admitted for permanent residence. The present law appears to confer citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." *U.S. ex rel. Guest* v. *Perkins*, D.C. D.C., 17 F. Supp. 177, 181.

The language was clarified to read:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the father or the mother: Provided, that such . . . . resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." (Appendix, p. 4a)

The Court of Appeals for the Seventh Circuit rejected the dual alternatives holding that ". . . in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization." (R. 55) This holding is directly inapposite to the rationale of *Petition of Black*, D. Minn., 64 F. Supp. 518, which held:

> ". . . It is difficult to believe, therefore, that, under these circumstances, Congress intended, by the passage of the Act of September 22, 1922, to render the citizenship rights of a child born to a marriage after

that date less favorable than they would have been if the mother had married prior to September 22, 1922. While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband. Whether, under these circumstances, the resumption of citizenship is termed "fictional" or "real" is of no particular significance. Congress intended that when a mother or father of an alien minor child became an American citizen and the child returned to this country for permanent residence, then the rights of American citizenship should be conferred on the minor child as provided in the Act of May 24, 1934. No sound reason is suggested why any distinction should be made for citizenship purposes under this statute between the mother of an alien child becoming an American citizen, and the mother, a citizen, returning to the United States during the minority of the child for permanent residence and terminating the marriage with the alien father. Here, the factual, situation meets every requirement of the statute. The child was born an alien. The mother remained a citizen and freed herself from the bonds of marriage with the alien father by returning to this country for permanent residence and obtaining a divorce. The child has permanently resided here for over five years. The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934, as if she had been married prior to September 22, 1922. Certainly her status as an American citizen, insofar as that would bestow rights upon the minor child is concerned, was the same. It seems clear, therefore, that the factual basis which Congress contemplated as a condition precedent to the granting of citizenship to an alien minor child has been fully attained.

To hold otherwise would be to unduly emphasize form rather than substance . . ." *Petition of Black,* 64 F. Supp. 518, 520-521.

Similarly in *Matter of Coll y Picard,* 37 Ops. Atty. Gen., 1 90, William D. Mitchell, then Attorney General, held a foreign born child, Fernando Coll y Picard, to have derived citizenship through its citizen mother even though she had never lost her citizenship. The opinion held that so far as the citizenship of her child is concerned, Mrs. de Coll should be treated as precisely in the same situation as one who had resumed her citizenship.

It is recognized that a certain emphasis is placed on the dissolution of the marriage in the *Black* case. We submit such emphasis is occasioned by the factual circumstances of that case. It is certainly not occasioned by a clear and plain reading of Section 5 of the Act of May 24, 1934, under which it was decided. In any event, it cannot be denied that, in the case of a widowed or divorced mother, the citizenship of the minors in her custody would follow her citizenship. The contention here is that petitioner did acquire American citizenship by virtue of his mother's nationality and resumption of residence even though his father was then living and in the absence of any decree or arrangement that his mother should have the custody of him. To a similar contention the District Court of the District of Columbia admitted that the "answer to that is not without some doubt." *Kletter* v. *Dulles,* 111 F. Supp. 593, 597. There is no basis in law or reason, where all other acts including custody, residence and separation, are the same, excepting absolute divorce or death, there should not be equal and like derivation of citizenship.

Further, in *Matter of Owen,* 36 Ops. Atty. Gen'l 197 and in *Petition of Drysdale,* D.C. Mich. 20 F. 2d 957, the

native born mothers respectively were naturalized and resumed their American citizenship many years before the deaths of their alien husbands. It seems clear enough that neither child derived citizenship through the resumption or naturalization of their mothers, which occurred while both parents were living and residing together in the marital relationship. Similarly, in *United States ex rel. Guest* v. *Perkins,* D.C. D.C., 17 F. Supp. 177, the child's native born mother and his alien father had separated by mutual consent under an agreement in which the custody of the child was given the mother. It was held that the child derived United States citizenship when the mother resumed citizenship.

Does it not offend against, not only equity and good conscience, but common sense, that a child of Prussian parents, all born in Prussia, should be recognized as an American citizen because his later widowed Prussian mother married a naturalized citizen, whereas, this petitioner, the child of a native born citizen and of resident parents, who knows nothing of Italy, its people, its language, its customs, should be considered a citizen and subject of Italy? Compare *United States* v. *Kellar,* C.C. Ill. 13 F. 82.

Petitioner was in the undisputed personal and sole actual custody of his mother for the first six months of his life, covering a period immediately before and after his entry in the United States. That this custody later was shared by his father does not affect his status upon entry. The attorney general had occasion to remark (*Matter of Coll y Picard,* 37 Ops. Atty. Gen'l 90, 95) that even a legal order for custody is not necessarily permanent.

IV.

RESTRAINT UPON THE FREEDOM OF LOCOMOTION AND TRAVEL OF PETITIONER'S CITIZEN MOTHER, THROUGH ERRONEOUS INTRUSION OF AN EXECUTIVE OFFICER OF THE UNITED STATES CANNOT BE AVAILED OF TO DEPRIVE THE PETITIONER OF AMERICAN NATIONALITY.

The petitioner was born on June 20, 1906. Under commonly accepted concepts he was conceived in mid-September of 1905. His mother left the United States in January, 1906, then four months pregnant. In March, when six months pregnant, the consul refused to allow her, and her unborn child to return to the United States, the place of her nationality and domicile. Until subsequent to his birth, petitioner and his United States citizen mother were prohibited from entering the United States. It was our submission to the lower courts that the rights of the petitioner were seriously encroached upon by an officer of the United States, and the Courts of the United States should act to rectify the wrong; that this petitioner, having been conceived in the United States, should be considered in being from the time of conception.

The Courts have been consistent and assiduous in rectifying such errors and in translating desire and attempt, wrongfully frustrated by a government official, into fact. Illustratively, we refer the Court to *Dos Reis ex rel. Gamara* v. *Nichols*, 1 Cir., 161 F. 2d 860 where the native born Camara, living in the Azores, got his draft notice into the Portuguese Army. Someone at the American consulate told him that if he wanted to join the American Army and avoid service in the Portuguese Army, he should return to America, which he was without means to do. To an administrative determination that he had expatriated himself by service in the Portuguese Army, the Court

made a finding that such service was involuntary and under duress and that he was still a citizen of the United States. In *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306, the application of the native born Podea for a passport was denied on the ground that Podea's citizenship was renounced when his father registered as a Roumanian. The Court found that the State Department's erroneous refusal of a passport led to Podea's being compelled to serve in the Roumanian Army. The Court of Appeals for the Seventh Circuit, itself, has held that "Certainly, the Government should not be heard to contend that a plaintiff has been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing. . . ." *Lee You Fee* v. *Dulles*, 236 F. 2d 885, 887.

There can remain little doubt that a consul's refusal to issue a passport to persons seeking to return to the United States is a denial of a right or privilege as a citizen of the United States. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753. However, the Seventh Circuit found "the action of the American Consul in Naples . . . not sufficient as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native born citizens: the issues there were voluntary expatriation. These holdings do not control the situation here." (R. 55) The basis for the decision is without merit, see *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753; *Lee Bang Hong* v. *Acheson*, D. Hawaii, 110 F. Supp. 49, 50; *Lee Hong* v. *Acheson*, D.C. Cal., 110 F. Supp. 60, wherein the plaintiffs were all naturalized citizens within the contemplation of the Fourteenth Amendment and none had been expatriated.

The government submits, as its only resistance to our submission on this point, that (1) in 1906 an American passport was not a necessary document for United States citizens wishing to come to the United States, that no entry document was required prior to May 22, 1918. We submit this is an unusual forum in which to raise the argument for the first time. We, further, submit that the argument is inconclusive. It does not take into account the requirements of Italian law affecting those persons who wished to leave Italy. The government also submits (2) that the facts testified to by the petitioner's mother, relative to this point, are incredible. The record evidences no incredulity on the part of the trial judge. We submit that both arguments submitted by the government are insubstantial.

CONCLUSION.

WHEREFORE, for the forgoing reasons, it is respectfully submitted that the judgment below be reversed and this cause remanded with instructions for the entry of a judgment declaring petitioner to be a Citizen of the United States.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner.

APPENDIX.

ACT OF APRIL 14, 1802, 2 Stat. 155.

Sec. 4, And be it further enacted, That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: Provided, also, that no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain, during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed.

REVISED STATUTES OF 1874.

Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of

the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were and may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

ACT OF MARCH 2, 1907, 34 Stat. 1228, 1229.

Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And Provided further*, That the citizen-

ship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

ACT OF MAY 24, 1934, 48 Stat. 797.

An Act to amend the law relative to citizenship and naturalization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1993 of the Revised Statutes is amended to read as follows:

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Sec. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided*, That such naturalization or resumption shall take place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."